



REPUBLIC OF KENYA



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Ithathu v Kinyua & 2 others (Cause 595 of 2014)
[2022] KEELC 4925 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 4925 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
CAUSE 595 OF 2014
JO OLOLA & L WAITHAKA, JJ
JUNE 16, 2022

BETWEEN

MARY WANGUI ITHATHU PLAINTIFF

AND

NGATIA KINYUA 1ST DEFENDANT

**KAIRITI MUGO (SUBSTITUTED BY FRANCIS MACHARIA
KAIRITI) 2ND DEFENDANT**

**KARIUKI MUGO (SUBSTITUTED BY CECILIA NYAMBURA
KARIUKI) 3RD DEFENDANT**

(FORMERLY HCC NO 152 OF 1994)

JUDGMENT

1. This suit began as Nyeri SRMCC No 211 of 1997 through which the plaintiff sought eviction orders against Ngatia Kinyua, Kairiti Mugo and Kariuki Mugo (hereinafter referred to as the original defendant).
2. *Vide* a statement of defence and counter-claim filed in July 1982 the original defendants contended that the plaintiff held plot No 595 Endarasha Settlement Scheme (hereinafter referred to as the suit property in trust for them; that the suit property was originally owned by Wachera Mugo, the mother to the 1st the 3rd defendants and the plaintiff's husband, Ithathu Mugo; that Ithathu Mugo was declared as the heir of the suit property through succession causes Nos 325/65 and 12/67; that as sons of Wachera Mugo, deceased, the 1st and the 3rd defendants were entitled to the suit property and that Ithathu Mugo held the suit property in trust for them.



3. The 1st and 3rd defendants complained that Ithathu Mugo, in breach of the pleaded trust, transferred the suit property to the plaintiff. It is the case of the 1st and 3rd defendants that the transfer of the suit property to the plaintiff is subject to their pleaded trust.
4. On his part, the 2nd defendant claimed that he bought 12 acres out of the suit property from Ithathu Mugo who put him in possession of the suit property awaiting clearance of outstanding loan with Settlement Fund Trustees (SFT) for his 12 acres to be transferred to him. It is the 2nd defendant's case that he has been in possession of the portion he bought since 1993.
5. For the foregoing reasons, the defendants urged the court to dismiss the plaintiff suit, allow their counterclaim by ordering that the plaintiff holds the suit property in trust for herself and them and determine the trust.
6. Pursuant to an order made in Nyeri Civil Appeal No 61 of 1992 on July 28, 1993, Ithathu Mugo joined the suit as a thirty party. Upon joining the suit, the plaintiff's husband, Ithathu Mugo, filed a statement of defence denying the contention by the 1st and 3rd defendants that the suit property was originally owned by their mother. Claiming that he was registered as the absolute proprietor of the suit property, the plaintiff's husband contended that no trust was ever created in respect of the suit property in favour of the 1st and 3rd defendant. The plaintiff's husband admitted that he transferred the suit property to the plaintiff herein but stated that the transfer was not in breach of any trust in favour of the 1st and 3rd defendants.
7. Concerning the claim by the 2nd defendant, the plaintiff's husband denied ever entering into any legally binding and enforceable sale agreement with the 2nd defendant for sale of 12 acres or any other portion of the suit property. The plaintiff's husband further contended that if any legally binding and enforceable agreement was entered into between himself and the 2nd defendant, the 2nd defendant was in breach thereof by failing to perform his part of the bargain.
8. The plaintiff's husband further contended that it was an agreement between the 2nd defendant and him that the 2nd defendant would transfer to him 2.5 acres out of plot No Tetu/Unjiru/456 in exchange of 12 acres out of the suit property which agreement the 2nd defendant failed to perform making him to rescind it.
9. The plaintiff's husband also denied the contention by the 2nd defendant that he had been in the suit property since 1973. For those reasons, the plaintiff's husband prayed that the defendants counterclaim be dismissed.
10. *Vide* a consent recorded on March 8, 1994 in Nyeri HCC Misc Civil Application No 11 of 1994 and issued on March 23, 1994, the suit was transferred to Nyeri High court for hearing and determination.
11. Pursuant to an order given on October 24, 2007 allowing the plaintiff to amend her plaint, the plaintiff filed an amended plaint.
12. Through her amended plaint, the plaintiff contends that she acquired the suit property free from any encumbrances from her deceased husband; that her husband was the legally registered allottee of the suit land. In the amended plaint, the plaintiff acknowledges that the defendants were in possession of the suit property before she was registered as the proprietor and continued to be in possession of the suit property even after her registration as the proprietor but terms their occupation wrongful, forceful and without the authority of the lawful owner.



13. It is the plaintiff's case that owing to the defendants act of trespass and damage, she has been denied her right of proprietorship of the suit property and the subdivisions therefrom to wit Nyeri/Endarasha 1066 to 1071.
14. Lamenting that the defendants have refused to vacate the suit property despite having been required to do so on various occasions, the plaintiff prays for judgment against the defendants for:-
 - (i) A declaration that the suit property and the subdivisions resulting therefrom is her rightful property;
 - (ii) An eviction order and vacant possession of the suit property including its subdivisions, Nyeri/Endarasha 1066, 1067 and 1071 against the defendants, their servants, agents, relatives, employees or any other person acting through them;
 - (iii) A permanent injunction to restrain the defendants, their servants, agents, relatives, employees or otherwise howsoever from further trespassing on the suit land, cutting down vegetation thereon, building any dwelling or other structures whatsoever, cultivating on the suit land or in any other way interfering with the suit land;
 - (iv) Mesne profits from the original date of filing this suit till the date when vacant possession will be given to her;
 - (v) General damages for trespass;
 - (vi) Costs plus other better relief out of the suit as the court may deem fit to grant.
15. When the matter came up for hearing, the plaintiff availed three witnesses, herself included, while the defendants availed two witnesses only.

Evidence

The Plaintiff's case

16. The plaintiff who testified as PW 1 informed the court that the original 1st defendant and 3rd defendant (now deceased and substituted by Francis Macharia Kairiti and Cecilia Nyambura Kariuki respectively) are brothers to her husband Ithathu Mugo; that she inherited the suit property from her husband, Ithathu Mugo in 1975; That the suit property had been acquired by her deceased husband's mother from SFT and was transmitted to her deceased husband through succession proceedings in respect of her deceased husband's mother, Wachera Mugo; that in 1988 she subdivided the suit property into six (6) subdivisions all in her name and that she is in possession of two only, Nyeri/Endarasha 1066 which she occupies with Ngatia Kinyua and 1071 occupied by Kariti Mugo and herself. She produced titles in respect of the two parcels as Pexbt 1(a) and (b) respectively. she informed the court that she does not have title in respect of Nyeri/Endarasha 1067 occupied by Ceasar Kariuki Mugo and Ngatia Kinyua because there is a prohibitory order. She produced a search certificate in respect of that property was as Pexbt 2. With regard to Nyeri/Endarasha 1068, she stated that she transferred it to Ceasar Kariuki Mugo pursuant to an agreement entered between Ceasar Mugo and her husband who was a party to this suit and is now deceased; that Ceasar Kariuki's son currently occupies parcel 1068. She produced an official search certificate in respect of that parcel as Pexbt 3; that she transferred Parcel No Nyeri/Endarasha 1069 and 1070 to Peter Muta J Wambugu and Ephraim Julius Maina. She produced official search certificates in respect of those properties as Pexbt 5 and 6 respectively.
17. The plaintiff testified that by the time she was married by her deceased husband in 1970, the 1st, 2nd and 3rd original defendants (Kairiti Mugo, Ngatia Kinyua and Kariuki Mugo) were in occupation of



- the suit property and that all three have their separate parcels of land but their occupation of the suit property was not peaceful; that the plaintiff's husband issued them with quit notices in 1968 (through SFT), 1971 and 1974 which the plaintiff produced as Pexbt 9(a) (b) and (c). On her part, she also issued the original defendants quit notices on January 1, 1976 and January 5, 1976 which she produced as Pexbt 13(a) and (b).
18. PW1 informed the court that she took over the payment of the loan in respect of the suit property in 1975 and finished paying the loan in 1988. She produced the payment schedule to SFT as Pexbt 10. She stated that there was an arbitration before a panel of elders pursuant to a referral order by the court; that all the parties to this dispute testified and the panel of elders made an award which she produced as Pexbt 14; which she was dissatisfied with prompting her to file this suit; that in 1975, the original parties to this dispute also attended the Land Control Board and that the Board took into account the views of the defendants.
 19. The plaintiff maintained that Ngatia Kinyua (2nd defendant in the original suit) did not buy 12 acres of the suit property as alleged; that the agreement relied on by the 2nd defendant was not approved by the relevant authorities. She denied the contention that the suit property was registered in her husband's name as a trustee and contended that her husband could not have been registered as a trustee because he was the last born in their family.
 20. The court heard that when Kairiti died in 2009, the plaintiff obtained an injunction restraining his family from burying him in parcel number 1071 but in disobedience of the order served on them, the family went ahead and buried him in the land. For that reason, the plaintiff urged the court to order for exhumation of his remains; that the dispute between the plaintiff and the Ngatia Kinyua (2nd defendant) was reported to the chief in 1988 and that Ngatia was required to explain how he acquired the land. The plaintiff produced letters from the chief as Pexbt 17(a) and (b). In reply, Ngatia wrote a letter indicating that he bought the land from her husband which she produced as Pexbt 18 and the order issued in succession cause No 12 of 1968 showing her husband succeeded his mother as Pexbt 19.
 21. In cross examination, the plaintiff stated that she got married in 1970 and resided in the suit property; that she found the defendants and their families in occupation of the suit property; that the families were still in occupation of the suit property at the time of hearing of this case and that the suit property was transmitted to her upon the demise of her husband. She admitted that the suit property was initially transferred from her deceased husband's mother, Wacera Mugo, to her husband and that neither her nor her deceased husband purchased the suit property. She admitted that she caused the suit property to be subdivided while this suit was still pending in court and that the original parcel of land, 575, was closed upon subdivision in 1988; that at the time of subdivision of the suit property the arbitral award given in case No 211 of 1977 had been filed and that the arbitral award had given her 22 acres, Ngatia Kinyua 12 acres, Kariuki Mugo 16 and Kairiti Mugo 16 acres. She admitted that she subdivided the land on her own and in so doing, she did not follow the award. She also admitted selling some of the subdivisions and gave Kariuki Mugo 9 acres (7 acres less than what he was awarded by the elders).
 22. She informed the court that her husband had land in Mweiga which he sold and came to inherit that of his mother, Wacera Mugo.
 23. She stated that Kariuki Mugo and Kairiti Mugo occupied the land in their capacities as children of Wacera Mugo and that Ngatia Kinyua is in occupation in his capacity as a purchaser of land sold to him by her husband.



24. She acknowledged transferring the land from SFT to her name and that she only managed to subdivide the suit property after the same was registered in her name as she could not do so when it was registered in the name of SFT.
25. Concerning the circumstances upon which the original claimants went to the Land Control Board, she stated that they went to the Board on the understanding that her deceased husband would give them 4 acres each to reciprocate their role in settling the loan.
26. She admitted that several family members of the defendants (Gitonga Kairiti, Robert Muthee) have died and are buried in the suit property; that she only objected to the burial of Kairiti Mugo in the suit property because Kairiti Mugo had a case with her but he was eventually buried there; that two of his sons are also buried there and she currently occupies parcel 1071 with his family although he initially occupied parcel No 1070.
27. In re-examination, the plaintiff stated that the 1st and 2nd defendants in the original suit were to be given land on the understanding that they would settle the SFT loan. Explaining that she personally settled the loan using milk proceeds, the plaintiff stated that in 1988 they all went to the Land Control Board where she offered to give the defendants four (4) acres because they did not contribute towards payment of the loan. Kariuki accepted the offer but Gitahi and Kairiti rejected and stormed out of the Board meeting although she does not know why. She admitted that she did not produce any document to show that the defendants were at the Land Control Board but based on Pexbt 10, stated that the defendants knew that the suit property was transferred to her apart from Ngata Kinyua was not present when the transfer was done. Based on Pexbt 12, the plaintiff stated that she made the last payment of the loan on September 30, 1986.
28. PW 2, Josphat Gikunda Ndukamatha, the District Land Adjudication and Settlement Officer Nyeri, told the court that he was in possession of the following documents:-
 - (i) Letter forwarding the legal documents for allotment to Wachera Mugo, dated January 30, 1967
 - (ii) Letter dated April 21, 1967 confirming that the land was allocated to Wachera daughter of Ithathu.
 - (iii) Letter dated April 24, 1967 addressed to director of settlement confirming that Wachera Mugo is the daughter of Ithathu Mugo.
29. He produced all the documents referred to in his evidence as a bundle marked Pexbt 20. He informed the court that from the documents in his possession, Wacera Mugo was issued by the Minister of Settlement with legal documents of ownership of the suit property that following the death of Wacera Mugo, there were succession proceedings *vide* Nyeri DMSC No Ruiru 325 of 1967. He produced a letter dated May 28, 1970 forwarding the order appointing Ithathu Mugo to be the heir and successor of the land as Pexbt 21. He informed the court that the legal documents were thereafter issued to Ithathu Mugo. Explaining that their practice requires that they date the documents using the date of allocation, he stated this explains why the documents issued to Ithathu Mugo are dated February 28, 1967. He produced the legal documents issued to Ithathu Mugo as Pexbt 22.
30. PW 2 further testified that the suit property was transferred by Ithathu Mugo to Mary C Wangui on July 16, 1975. He produced the transfer documents as Pexbt 23. Subsequently, a new charge document was issued to Mary C Wangui on September 30, 1975 which he produced as Pexbt 24 and the signed document as Pexbt 25. He stated that a transfer of land normally takes place irrespective of whether there is a loan or not because the loan is transferred with the land.



31. The court heard that there was a letter by Ithathu Mugo (Pexbt 9(c) giving notice to some people to move out of the land. Concerning the circumstances upon which the letter was written, he stated that Ithathu Mugo informed their office that there were people trespassing on his land.
32. produced a letter dated July 16, 1982 (Pexbt 26) from their office replying to HK Ndirangu Advocate. Through that letter, their office informed HK Ndirangu Advocate that Ithathu Mugo inherited the land from Mrs Wacera Mugo and that Ithathu Mugo had transferred the land to his wife, Mary C Wangui.
33. In cross examination, PW 2 confirmed that the original allottee of the land in dispute was Wacera Mugo mother to Ithathu Mugo; that the land was transmitted to Ithathu Mugo who thereafter transferred the land to the plaintiff herein. Referring to the application for transfer of the land to the plaintiff, he stated that the transfer was by way of gift and there was no consideration at all (Pexbt 7(a)). He pointed out that in the transfer, it is stated that the land was fully developed and that the farming experience of the transferee was stated.
34. Concerning occupation of the land by the children of the original allottee, PW 2 said that the deceased's children would be rightly in occupation upon death but clarified that if the defendants were in occupation he did not know when they entered the land.
35. In re-examination, PW 2 stated that the land was under a loan from SFT which was paid by Wacera Mugo; that based on a letter dated May 11, 1967 (Pexbt 20) by Wacera Ithathu, the suit land was occupied.
36. PW 3 Julius Kariuki Mundia, who was at the material time a processor server, informed the court that he received a chamber summons and order dated August 11, 2008 with instructions to serve them upon the defendants. His evidence is to the effect that he served the order that was restraining the defendants from burying Kairiti Mugo in the suit property. Other than proving that there was disobedience of a court order when Kairiti Mugo was buried in the suit property, his statement has no probative value concerning the issues of ownership and entitlement of the suit property by the parties to this suit.

The Defendant's case.

37. DW 1 John Ngatia Kinyua relied on his statement filed on October 31, 2013 after the same was adopted as his evidence in chief.
38. In cross examination, he stated that he is aware that the current suit emanated from original parcel No 595 registered in the name of Ithathu Mugo, later registered in the name of his wife; Mary Ithathu Mugo. He stated that he was not aware that parcel No 575 was subdivided. He informed the court that he purchased 12 acres out of parcel number 575 and paid Kshs 400,000/= for the land; that he entered into a sale agreement with Ithathu Mugo not his wife and was not aware of letters written by Ithathu Mugo asking him to vacate his land in 1971-1974 or the exhibits to that effect before this court. He informed the court that he could not remember when Mr Ithathu passed on because he died in Baringo.
39. In re-examination, he stated that he only purchased one parcel measuring 12 acres from Ithathu Mugo which is where he currently lives and he and the plaintiff have never had a dispute regarding any other land.
40. DW 2 Macharia Kairiti informed the court that he is the son of Kairiti Mugo; that he was substituted in place of his father. He relied on his witness statement recorded on October 11, 2013 after the same was adopted as his evidence in chief.



41. In cross examination, he stated that Ithathu Mugo and his father were brothers; that in that homestead, they were 4 brothers; that his father was the 2nd born son and Ithathu Mugo was the last son; that it was his grandmother Wacera Mugo who was given the suit land by the Government not his uncle Ithathu Mugo; that he was not aware that his father and his brothers went to the LCB when his grandmother was transferring the land to Ithathu Mugo but was aware that the plaintiff's husband was holding the land in trust for his brothers having being registered in that capacity because he was the only literate brother among his siblings.
42. In re-examination, he reiterated what was contained in his statement that his grandmother was allocated the suit land by SFT but stated he didn't know how it was registered.
43. At close of hearing, parties filed written submissions which I have read and considered.

Analysis and determination

44. From the pleadings and the submissions, I find the issues for the court's determination to be as follows:-
 - (i) Who was the original owner of the suit property?
 - (ii) Under what circumstances was the suit property registered in the name of the plaintiff's husband and subsequently in the name of the plaintiff?
 - (iii) Whether the suit property is subject of any trust in favour of the defendants or any of them?
 - (iv) What was the legal effect of the transfer of the suit property by the plaintiff and the subsequent transfer of some of the subdivisions thereof to persons some of whom are not parties to this suit.
 - (v) Whether the plaintiff has made up a case for being granted the orders sought in her amended plaint?
 - (vi) Subject to outcome of issue (v) above whether the defendants have made up a case for being granted the orders sought in their statement of defence and counter-claim.
 - (vii) What orders should the court make.
45. On issue number (i), the evidence of PW 2, which evidence was not controverted or challenged in any way, laid it bare that the suit property was originally allocated to the plaintiff's mother, Wacera Mugo. The import of the evidence of PW 2 to the effect that the original suit property was allocated to the plaintiff's husband mother as opposed to the plaintiff's husband is to render the contention by the plaintiff and her husband in their pleadings, the amended plaint and third party statement of defence respectively, untrue and unproven.
46. Concerning the circumstances upon which the plaintiff's husband was registered as the proprietor of the suit property, the totality of the evidence adduced in this case shows that he was registered as the heir of the estate of his deceased mother. No evidence whatsoever was given capable of showing that the plaintiff's mother had given the property to the plaintiff's deceased husband during her life time or that she intended it to be inherited by the plaintiff's husband to the exclusion of his brothers who, admittedly were in use and occupation of the suit property when the same was registered in the name of the plaintiff's husband. In view of the foregoing, I have no difficulty in finding that the registration of the plaintiff as the heir of his mother's estate comprised in the suit property was subject to his brothers' interest therein. Those interests were not affected by the subsequent transfer of the property to the plaintiff. The evidence adduced in this case shows that the plaintiff's husband transferred the suit property to her as a gift and not for any valuable consideration paid to him by her.



47. On whether the suit property is subject to any trust in favour of the defendants, having determined that the property belonged to the plaintiff husband's mother and that there is no evidence that the plaintiff husband's mother had given it wholly to the plaintiff's husband or intended to pass it to the plaintiff's husband to the exclusion of his brothers who were equally in use and occupation of the suit property, I have no difficulty in finding that the registration of the suit property was and is subject to a trust in favour of the plaintiff's husband and the plaintiff husbands' siblings, in the circumstances of this case, the 1st and the 3rd original defendants. Because the 2nd defendant's claim is premised on a different set of facts, I will consider it separately.
48. On whether registration of the plaintiff's husband was subject to a trust in favour of the 2nd defendant on account of the 2nd defendant having bought 12 acres of land from the suit property; during cross examination the plaintiff acknowledged that the 2nd defendant had an agreement with her deceased husband but challenged the agreement on the ground that the agreement was not approved by the relevant authorities. However, the plaintiff did not tell the court which authorities needed to approve the agreement and the effect of want of approval. The existence of the agreement between the 2nd defendant and the plaintiff's husband is impliedly alluded to in the plaintiff's husband's third party defence. The plaintiff's deceased husband contended that the agreement was rescinded for breach of the terms thereof by the 2nd defendant. However, no evidence of breach of the agreement or the alleged rescission of the agreement was adduced by the plaintiff.
49. Noting that both the plaintiff's husband and the defendant got an opportunity to adduce evidence before the panel of elders and that upon considering the evidence adduced before it the panel of elders determined the dispute in favour of the 2nd defendant and there being no evidence adduced before this court to disturb the decision of the elders who had the benefit of hearing both the plaintiff's husband and the 2nd defendant, I decline to set aside the decision of the elders to the effect that the plaintiff's husband's registration of the suit property is subject to a trust in favour of the 2nd defendant on account of the sale agreement between the plaintiff's deceased husband and the 2nd defendant.
50. Concerning the issue of the effect of subdivision of the suit property by the plaintiff and transfer of some of the subdivisions thereof to persons who are not parties to this suit, it is noteworthy that the plaintiff admitted having subdivided the suit property into six parcels during the pendency of this suit. It is also noteworthy that at the time the plaintiff subdivided the suit property there existed an arbitral award made in this case and which award had not been set aside. In causing the suit property to be subdivided, the plaintiff admitted that she disregarded the award because she did not agree with it.
51. I find the conduct of the plaintiff to have been not only unlawful but prejudicial to the outcome of this case, as it has the potential of complicating execution of orders issued in this court should this court affirm the award of the elders.
52. On whether the plaintiff has made a case for being granted the orders sought, having determined that the defendants are in occupation of the suit property on account of their beneficial interest therein and the plaintiff having failed to prove that registration of the suit property in her name is not subject of any trust in favour of the defendants, I find and hold that the plaintiff has failed to prove her case against the defendants. Consequently, I dismiss her case with costs to the defendants.
53. With regard to the defendant's counterclaim, having found that the suit property is subject of a trust in favour of the defendants, I allow the defendants' counterclaim and, accordingly determine the trust in the suit property.
54. As to what orders this court should issue; having carefully considered the evidence adduced in this case which shows that the plaintiff and her husband made substantial contribution in the acquisition of the



property, I do find that the plaintiff, on account of her substantial contribution of the suit property was entitled to a larger share of the suit property. It would appear that the elders who arbitrated this dispute took account of that fact in awarding the plaintiff's husband 22 acres while awarding his other brothers 16 acres. Considering the other portion (12 acres) awarded to the 2nd defendant was on account of additional benefit which accrued to the plaintiff's husband, I am of the considered view that the 34 acres awarded to the plaintiff and her husband by the elders was fair and reasonable in the circumstances. Consequently, I decline to interfere with the award of the elders and order the plaintiff to ensure total compliance with the award made by the elders in this suit.

55. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 12TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2022.

J. O. Olola

JUDGE

